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CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ARTHUR WELD and LORINE KINZ,
Petitioners,

-vs-

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

No. 635

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND AFFIDAVITS IN SUPPORT THEREOF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1940

No._____

ARTHUR . ELD and LORINE KINZ,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

---

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COME ARTHUR . ELD and LORINE KINZ and move the court for leave to proceed in forma pauperis under the provisions of 28 U.S.C.A. 832, upon typewritten briefs and record and without prepayment of costs.

Said motion is made upon the ground that petitioners are citizens of the United States; that they are without funds with which to pay the cost of printing briefs and transcript and that they are informed and believe, and therefore allege that they have good ground to petition this court to issue a writ of certiorari to the Superior Court of the State of California, in and for the County of Alameda.

HERBERT BRUNER
Attorney for Petitioners

LEIGH H. ANDERSEN

GEORGE L. HAUSEN
Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No._____

ARTHUR «ELD and LORINE KINZ, )

Petitioners, )

vs. )

THE PEOPLE OF THE STATE OF CALIFORNIA )

Respondents. )

---

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA, )
) ss
CITY AND COUNTY OF SAN FRANCISCO, )

ARTHUR «ELD, being first duly sworn, deposes and says that he is one of the petitioners in the above-entitled case; that he is a citizen of the United States; that he has been informed by his attorneys and therefore alleges that he has good ground to petition the Supreme Court of the United States to issue a writ of certiorari to the Superior Court of the State of California, in and for the County of Alameda, on the ground that his constitutional rights were violated in the course of his trial on a charge of violating Ordinance 3-6.01 of the City of Oakland, State of California, in the Police Court of the City of Oakland, County of Alameda, State of California, before the Hon. Chris B. Fox;

THAT he is employed by the W.P.A. as a research worker, and earns the sum of Eighty-two ($82.50) Dollars and fifty cents monthly; that he is in debt; that the said sum of money he earns is sufficient only to meet his personal needs and costs of livelihood; that he is unable to pay for the printing of transcript or briefs on certiorari and unable to pay Clerk's fees.

WHEREFORE, he prays leave to proceed in forma pauperis upon the typewritten transcripts and brief and without prepayment of fees, under the provision of 28 U.S.C.A. 832.

ARTHUR ARNOLD

Subscribed and sworn to before
me this 14th day of December, 1940

ALICE C. WEISE SEAL
NOTARY PUBLIC
In and for the City and County of
San Francisco, State of California

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. _____

ARTHUR FELD and LORINE KINZ, )

Petitioners, )

vs. )

THE PEOPLE OF THE STATE OF CALIFORNIA, )

Respondents. )

---

AFFIDAVIT IN SUPPORT OF MOTION TO

PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA )
) ss
CITY AND COUNTY OF SAN FRANCISCO)

LORINE KINZ, being first duly sworn deposes and says that she is one of the petitioners in the above-entitled case; that she is a citizen of the United States; that she has been informed by her attorneys and therefore alleges that she has good ground to petition the Supreme Court of the United States to issue a writ of certiorari to the Superior Court of the State of California, in and for the County of Alameda, on the ground that her constitutional rights were violated in the course of her trial on a charge of violating Ordinance 3-6.01 of the City of Oakland, State of California, in the Police Court of the City of Oakland, County of Alameda, State of California, before the Hon. Chris B. Fox;

THAT she is a housewife and the mother of two (2) small children; that her husband has worked only itinerantly since September 18, 1940; that she is without funds and the money her husband earns is necessary for the support of their family; that she is unable to pay for the printing of transcript or briefs on certiorari and unable to pay Clerk's fees.

WHEREFORE, she prays leave to proceed in forma pauperis upon the typewritten transcripts and brief and without prepayment of fees, under the provisions of 28 U.S.C.A. 832.

LORINE KINZ

Subscribed and sworn to before me
this 14th day of December, 1940

ALICE C. MORSE
NOTARY PUBLIC
In and for the City and County of
San Francisco, State of California

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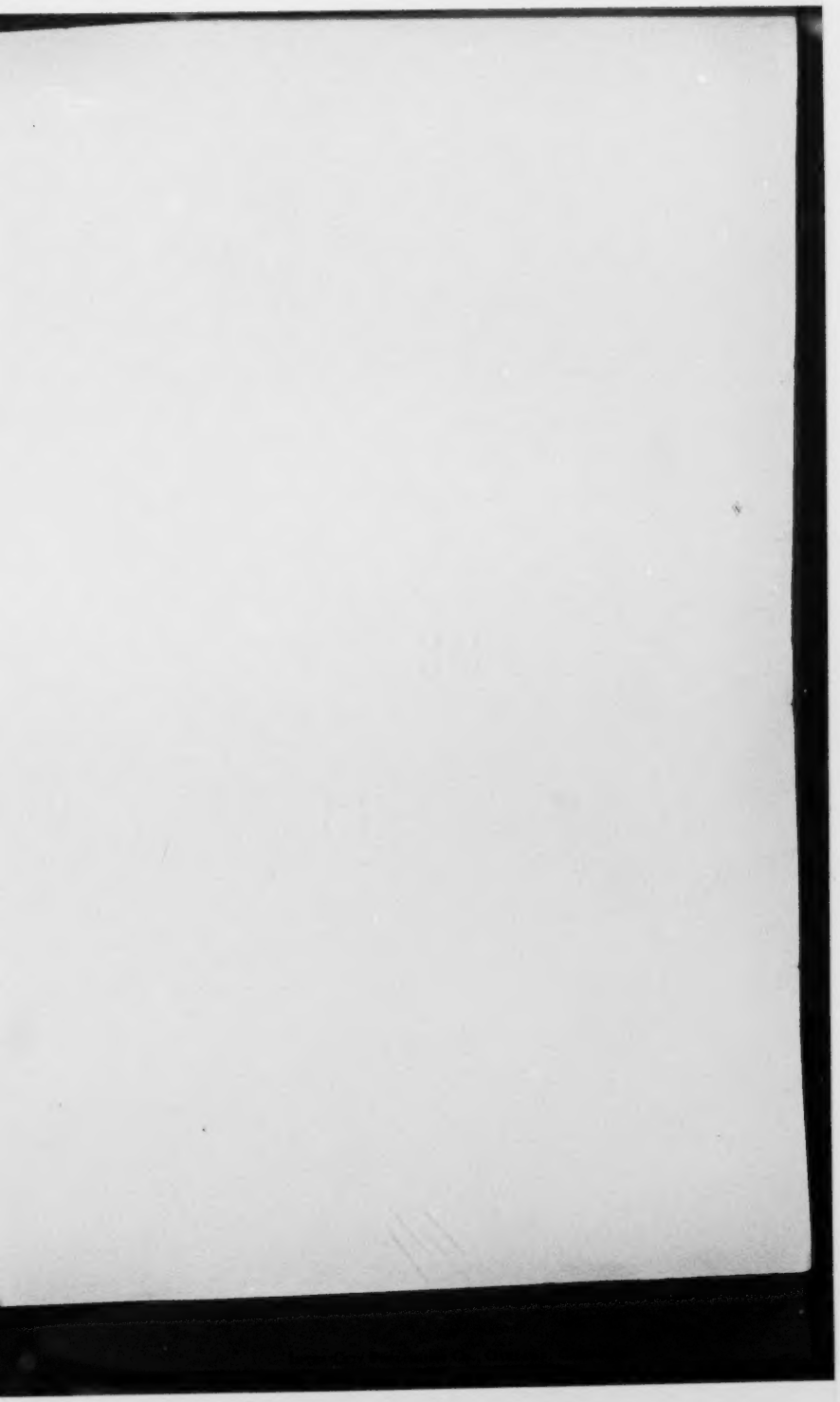
(SEAL)



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FILED
DEC 18
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ARTHUR GOLD and LORENE KIEL,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

No. 635

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA, AND BRIEF IN SUPPORT THEREOF


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* * * * *

Note: The Brief in support of the Petition is set out following the Petition, and is numbered starting with the number one (1), and is preceded by an index.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ARTHUR ⌀ELD and LORINE KINZ,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

No._____

PETITION FOR A ⌀RIT OF CERTIORARI

TO THE SUP⌀RIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, ARTHUR ⌀ELD and LORINE KINZ, respectfully allege:

A.

Summary Statement of the Matter Involved

Petitioners were convicted in the Police Court of

the City of Oakland, County of Alameda, State of California of violating a Municipal Ordinance of the said city, Section 3-6.01 of the Oakland Municipal Code, which provides as follows:

> "Whenever the free passage of any street or sidewalk shall be obstructed by a crowd, except on the occasion of public meetings, the persons composing such crowd shall disperse or move on when directed to do so by a police officer. It shall be unlawful for any person to refuse to so disperse or move on when so directed to do by a police officer as herein provided."

(The said ordinance may be found in the official edition collecting City of Oakland Municipal ordinances, at page 72.)

Petitioners were each sentenced to pay a fine of $100.00 or serve twenty-five days in the Oakland City Prison. (R. p.21) They took an appeal to the Superior Court of the State of California in and for the County of Alameda, which court affirmed the judgments of conviction on September 19, 1940. (R.p.39) They are now on bail.

Petitioners at the outset and throughout these proceedings challenged the validity of the ordinance set out above both upon its face and as applied and enforced in their case as being violative of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. (See Brief, infra, p.2-5, for abstract of case.)

B.

JURISDICTION
(Pursuant to Rules 38(2) and 12(1))

1. Statutory Provision.

This Court's jurisdiction rests on Section 237(b)

of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A.Sec. 344.)

2. State Statute Validity of which Involved-

(See supra, p. 2.)

3. Finality of Judgment-

The judgment below became final on September 19, 1940.

4. Petition Timely Filed-

This petition is filed within the time provided by R.S. 1008, (28 U.S.C.A. Sec. 350), being presented before December 19, 1940.

5.. Judgment of Highest State Court-

The Superior Court of the State of California in and for the County of Alameda is the court of last resort in the state insofar as a case originating in the Police Court of the City of Oakland like the instant case is concerned; the various county superior courts being courts of last resort under the law of California in cases originating in Justice, police or municipal courts within such counties.

McLean v. Freiberger, 215 Cal. 1

Carlson v. California, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 668

6. Cases sustaining Jurisdiction-

The following cases are believed to sustain the jurisdiction of this court in the instant case.

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 118

Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 669

Carlson v. California, supra

Fiske v. Kansas, 274 U.S. 380, 47 S. Ct. 655, 71 L. Ed. 1108

Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888

7. Federal Questions Raised.

In the court of first instance (Police Court of City of Oakland) the said ordinance was challenged by petitioners as being repugnant to the due process of law clause of the Fourteenth Amendment by demurrer, and by motions to dismiss. (R. p. 3-9) The demurrers were overruled, and the motions to dismiss were denied. (R. p. 22)

Thereafter, in the same court, upon completion of the People's case, petitioners moved the court for advised verdicts of acquittal upon the grounds that the People had proved the petitioners were engaged in peaceful picketing, carrying banners, and distributing leaflets, all in a peaceful, lawful, and orderly fashion; that the people had failed to prove the petitioners had committed the offense contemplated by the ordinance; that any obstruction of the sidewalk was purely incidental to the exercise by petitioners of guaranteed constitutional rights; that to permit the case to go to the jury or to allow the conviction of the petitioners upon the evidence presented by the People themselves would constitute such an application and enforcement of said ordinance against

petitioners that they would be deprived of liberty of speech and press without due process of law within the meaning of the Fourteenth Amendment. (R. p.32) The court denied the motions. (R. p.32)

Petitioners put in their defense. The cause was argued, the jury charged, and submitted. The jury found the defendants guilty as charged. (R. p.11-12)

Petitioners made motions in arrest of judgment and for a new trial upon the same grounds as those urged in support of the motions for an advised verdict of acquittal. (R. p.13-15 The motions were denied by the trial court (R. p.21) which thereupon proceeded to pronounce the sentences set out above.

Petitioners took an appeal to the Superior Court of the State of California in and for the County of Alameda from the final verdicts and ~~sentences~~ judgments of conviction, and from the orders denying motions for a new trial and in arrest of judgment.

By written brief and oral argument upon the taking of said appeal and at the outset thereof the same points as those set out above were urged upon the appellate court as necessitating a reversal. (R. p.22-26) The judgment of conviction and the orders denying the motions in arrest of judgment and for a new trial were affirmed by said court. (R. p.39) It is to this judgment wherein the federal questions set out above were finally resolved in the state court of last resort that this petition is addressed.

B. Questions Involved are Substantial-

See infra, pp. 8-11.

C.

QUESTIONS PRESENTED

Four questions are presented:

1. Does Ordinance 3-8.01, upon its face, abridge and deny that liberty of speech, press and assemblage, and deprive of property without due process of law in violation of the Fourteenth Amendment?

2. Is Ordinance 3-8.01 repugnant to the due process of law clause of the Fourteenth Amendment in that it is altogether vague and indefinite and provides no reasonably ascertainable standard of guilt?

3. Was Ordinance 3-8.01 so applied and enforced in the instant case that it abridged and denied petitioners' liberty of speech, press and assemblage and deprived them of property without due process of law in violation of the Fourteenth Amendment, and in such a way as to circumvent decisions of this Court? (Schneider v. State, supra; Carlson v. California, supra; Thornhill v. Alabama, supra)

4. Was Ordinance 3-8.01 so applied and enforced in the instant case, in the refusal of the trial court to give the following instructions and the appellate court's ruling that such refusal was not error, that petitioners were denied liberty of speech, press and assemblage, and deprived of property without due process of law in violation of the

Fourteenth Amendment?

Defendants' Proposed Instruction No. 1

The right of peaceful picketing is guaranteed and protected by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 2

If you find from the evidence that the defendants were engaged in peaceful picketing it is your duty to find them not guilty.

Defendants' Proposed Instruction No. 3

If you find from the evidence that the defendants were engaged in peaceful picketing and that pedestrians were able to pass along the sidewalk where the picket line was maintained and were not molested nor prevented from passing by the picket line, you should find the defendants not guilty.

Defendants' Proposed Instruction No. 6

You are advised that the right to freely assemble on the street for the purpose of meeting and discussing public questions is guaranteed to all by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 7

If you find from the evidence that the defendants met in the street for the purpose of publicizing and discussing a public question you are instructed that these acts are not subject to punishment.

Defendants' Proposed Instruction No. 8

You are advised that before you can find the defendants guilty in this case you must be convinced beyond a reasonable doubt that they wilfully and intentionally obstructed the sidewalk in front of Romley's Market, and so as to prevent and for the purpose of preventing passers-by from passing along the said sidewalk.

D.

Reasons Relied on for the Allowance of the Writ

1. The courts below have held valid Ordinance 3-6.01 as a valid exercise by a municipality of its police power in connection with regulating the use of sidewalks and streets, despite the fact that said ordinance, on its face, abridges and denies liberty of speech, press and assemblage, and deprives of property without due process of law in violation of the Fourteenth Amendment, and the courts below have thereby ignored and refused to follow the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra; Thornhill v. Alabama, supra.

Insofar as counsel know and are advised, this Court has not yet passed on the question of whether a local "Move-on" ordinance similar to the ordinance here involved violates the due process clause of the Fourteenth Amendment. A federal question of first instance is thereby presented to this Court.

2. The courts below have held valid Ordinance 3-6.01 as being a proper and valid penal statute, although

said statute is altogether vague and indefinite, sets up no reasonably ascertainable standard of guilt, and is so broad, general and all-inclusive in its terms and language, that it makes peaceful and lawful acts and constitutionally protected activity, criminal. Said statute plainly violates the due process of law clause of the Fourteenth Amendment, and the courts below, in failing to so hold, have ignored and refused to follow the decisions of this Court, to-wit:

Lanzetta v. New Jersey, supra;

Carlson v. California, supra;

Thornhill v. Alabama, supra

3. The evidence in this case plainly shows that petitioners were engaged in peaceful picketing, carrying banners and distributing leaflets, and thereby exercising that liberty of speech, press and assemblage protected by the due process of law clause of the Fourteenth Amendment. Nevertheless, petitioners were arrested, charged, convicted and their convictions affirmed, of violating a "Move-on" ordinance. The evidence shows that any obstruction of the sidewalk or street, which may have occurred, was purely incidental to the exercise by petitioners of their constitutional rights, and that there is no evidence showing these petitioners to have blocked or obstructed the passage of any person. The conviction of petitioners, and the affirmance of those convictions, constitute an application and enforcement against them of Ordinance 3-6.01, in an unconstitutional manner, and in such a way as to deprive

them of their constitutional liberties of freedom of speech, press and assemblage, without due process of law.

The courts below, by such action, circumvented the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra; Thornhill v. Alabama, supra. If a municipality, supported by local courts, can enforce and apply a "Move-on" ordinance in the manner done in this case, without restraint, then the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra, become meaningless. While abstractly recognizing the constitutional right to peacefully picket, distribute leaflets, carry banners, and peaceably to assemble, the municipality supported by local courts will simply turn to such a "Move-on" ordinance as was employed in this case to prohibit by indirection what they cannot directly prohibit.

It seems clear to us that this Court must strike down such misapplication and enforcement of local "Move-on" laws under circumstances revealed in this case, if the decisions in Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra, are to have continued meaning and force.

The courts below have ignored the decisions of this Court that while a statute may be valid, it nevertheless cannot be enforced or applied to deny and take away liberty of speech, press and assemblage, to-wit:

Fiske v. Kansas, supra;

De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278.

4. In refusing to give the instructions noted above, supra, pp. 7-8, the courts below refused to permit the jury to find that if petitioners were engaged in the exercise of constitutionally protected rights, viz: peaceful picketing, distributing leaflets, carrying banners, peaceably assembling, they could not be guilty of violating Ordinance 3-6.01. The trial court, by refusing to grant these instructions, and thereby not permitting the jury to pass on this question and the Superior Court in holding there was no error in the refusal to grant these instructions, made an unconstitutional application and enforcement of Ordinance 3-6.01.

In other words, the courts below refused to instruct the jury that constitutional rights were paramount, and that any incidental obstruction of the sidewalk would not constitute a violation of Ordinance 3-6.01. So long as defendants were engaged in the peaceful and lawful exercise of their constitutional rights of speech, press and assemblage, they could not be guilty of violating Ordinance 3-6.01, and the courts below in failing to so instruct the jury, although requested so to do by petitioners, ignored and refused to follow the decisions of this Court in Fiske v. Kansas, supra; De Jonge v. Oregon, supra; Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra.

WHEREFORE, your petitioners pray that this Hon-

orable Court will be pleased to issue its Writ of Certiorari to the Superior Court of the State of California, in and for the County of Alameda, commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said court "No. 16412, THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. ARTHUR FELD and LORINE KINZ, Defendants and Appellants," to the end that said case may be reviewed and determined by this Court as provided by law, and that said judgment of said Superior Court of the State of California, in and for the County of Alameda, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just.

DATED: San Francisco, California
December 16th, 1940

Herbert Resner
Attorney for Petitioners

George Andersen

George Clahausen
Of Counsel

# BRIEF

IN SUPPORT OF PETITION FOR A

WRIT OF CERTIORARI

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-b-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

| | |
|---|---|
| ARTHUR ELD and LORINE KINZ, Petitioners, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents. | No._____ |

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion is not reported, but may be found at R. p. 41.

II.

JURISDICTION

The basis upon which this court's jurisdiction rests is fully set out in the Petition for a Writ of Certiorari, supra, pp. 2-4

III.

ABSTRACT

Petitioners were arrested, charged and convicted of violating Ordinance 3-6.01 of the City of Oakland. Said Ordinance is set out in the Petition for Writ of Certiorari, supra, p. 2. The evidence showed that petitioners and some seventeen (17) other persons were engaged on the evening of April 6, 1940 in picketing the grocery and market of one SHORD T. ROMLEY, at Seventh and Campbell Streets, Oakland, California. (R.p.29). Petitioners and other pickets were members of a Jobs for Negroes Committee, which was trying to obtain equal job opportunities for Negroes in west Oakland, where Romley's Market was located, (R. p. 33,34) and where the population is predominantly Negro. (R.p.34). The Jobs for Negroes Committee prior to the picket line of April 6, 1940, had complained to Romley because of his discharge of a Negro employee. (R. p.33). While picketing, petitioners and the other pickets wore banners across their chests, bearing the following inscriptions: "Jobs for Negroes," "No Discrimination," "Do Not Patronize," "Unfair to Colored People." (R. p.27).

There was testimony that a crowd of four to five hundred persons gathered to watch the pickets. (R. p.28). The pickets marched several paces apart in an uneven circle in front of Romley's store. The petitioners and pickets were peaceful at all times. (R. p.30. The petitioners and pickets did not intimidate anyone, nor use violence, nor coercion of any kind. (R. p.30).

Petitioners and pickets distributed leaflets which they handed to passers-by who took the leaflets voluntarily. (R. p. 27-28). One of the People's witnesses, Sargeant E. F. Risedorph, in charge of a police squad, came upon the scene when petitioners and other pickets were picketing, and commanded them to "Move on; Clear the sidewalk; Break it up and get moving." (R. p. 29). Risedorph testified that while it was difficult for other persons to pass by on the sidewalk, it was possible for passers-by to pass through the picket line, and that he did not see any of the pickets or petitioners try to stop any person from passing. (R. p. 30). Another police officer, H. O. Fisher, called by the people, testified that he saw passers-by "elbow their way through the crowd" (R. p. 30). Fisher testified that the picketline and petitioners were entirely peaceful, and that neither petitioners nor any other pickets tried to stop any passers-by (R. p. 31). The people called one Nick Billicich, who testified that he owned a gasoline station across the street from Romley's, and that on the evening of April 6, 1940, he saw petitioners picketing in front of Romley's. While Billicich testified that "there was such a crowd in front of Romley's, you couldn't get through," he nevertheless crossed the street, passed through the crowd, went into Romley's Store, where he got some change, and passed back through the crowd and returned to his gasoline station (R. p. 32). Neither petitioners nor any other pickets tried to stop him from going in or out of the market, and one of the

pickets gave Billicich a leaflet, which he took voluntarily (R. p. 33).

George Kanaris testified for the People that he worked near Romley's and that when he left work with his wife "there was such a crowd you couldn't get through," but that he didn't try to get through (R. p. 31).

Louis De Castro, called by the People, largely testified in the same manner as did the other police officers (R. p. 32).

The defendants put on various witnesses who testified that petitioners and other pickets were engaged in peaceful picketing, carrying banners, distributing leaflets, and that the pickets did not block the sidewalk, did not try to stop anyone from passing, and that many persons passed along the sidewalk through the picket line without difficulty (R.p. 32-3

Reverend Henry Johnson, Pastor of the Negro Taylor Memorial Methodist Church in Oakland, testified that he was Chairman of the Jobs for Negroes Committee, whose objectives were to secure equal job opportunities for Negroes, particularly in West Oakland, where Romley's store was located, and where most of Oakland's Negro population lives, and that the Committee was trying to bring about a better understanding between white persons and Negroes on the subject of the serious economic plight of the Negroes who were discriminated against in the matter of jobs. He testified that he called upon Romley with other members of the Committee prior to the

establishment of the picket line in order to settle the disagreement over Romley's discharge of a Negro employee, but that the controversy was not settled and the picket line resulted (R. p. 34).

The cause was argued, the jury instructed, and retired to return with verdicts finding the petitioners guilty as charged.

IV.

ASSIGNMENTS OF ERROR RELIED UPON

1. That the petitioners, and each of them, were deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, in that Ordinance No. 3-8.01, for alleged violations of which petitioners were convicted, is void upon its face, in that it abridges the constitutional liberties of freedom of speech, press, and assemblage, and that the Superior Court of the State of California, in and for the County of Alameda erred in failing to so hold.

2. That the petitioners, and each of them, were deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, in that Ordinance No. 3-8.01, for alleged violations of which petitioners were convicted does not provide any reasonably ascertainable standard of guilt; that said Ordinance is so broad, general and all-inclusive in its terms and language that it makes peaceful and lawful acts and con-

stitutionally protected activity criminal; that said Ordinance is vague, uncertain, ambiguous and indefinite, and does not properly or sufficiently describe the offense or offenses sought to be created and punished, and therefore is not a valid penal statute within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution; and that the Superior Court of the State of California, in and for the County of Alameda erred in failing to so hold.

3. That the petitioners, and each of them, were deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution in that Ordinance No. 3-8.01, for alleged violations of which petitioners were convicted, was applied and enforced against petitioners, and each of them, in an unconstitutional manner, in that there was no evidence of any wrongful act or acts committed by petitioners, or either of them; that the evidence herein shows that petitioners were engaged in peaceful picketing, carrying banners, and distributing leaflets, and thereby that they were exercising their constitutional rights of free speech, press and assemblage; that any obstruction to the sidewalk wherein petitioners were engaged in said activities, was purely incidental; and that said Ordinance No. 3-8.01 was enforced and applied by law enforcement officials of the State of California, to prevent and restrain said peaceful and lawful acts and con-

duct and the exercise of constitutionally protected civil rights and liberties by petitioners, and each of them, and that the Superior Court of the State of California, in and for the County of Alameda erred in failing to so hold.

4. That the trial court erred in refusing to give the following instructions requested by petitioners:

Defendants' Proposed Instruction No. 1

The right of peaceful picketing is guaranteed and protected by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 2

If you find from the evidence that the defendants were engaged in peaceful picketing it is your duty to find them not guilty.

Defendants' Proposed Instruction No. 3

If you find from the evidence that the defendants were engaged in peaceful picketing and that pedestrians were able to pass along the sidewalk where the picket line was maintained and were not molested nor prevented from passing by the picket line, you should find the defendants not guilty.

Defendants' Proposed Instruction No. 6

You are advised that the right to freely assemble on the street for the purpose of meeting and discussing public questions is guaranteed to all by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 7

If you find from the evidence that the defendants met in the street for the purpose of publicising and discussing a public question you are instructed that these acts are not subject to punishment.

Defendants' Proposed Instruction No. 8

You are advised that before you can find the defendants guilty in this case you must be convinced beyond a reasonable doubt that they wilfully and intentionally obstructed the sidewalk in front of Romly's Market, and so as to prevent and for the purpose of preventing passers-by from passing along the said sidewalk.

That by refusing to give the above requested instructions, the trial court applied and enforced the said Ordinance No. 3-6.01 of the City of Oakland, County of Alameda, State of California in an unconstitutional manner against petitioners, and each of them, in that the trial court thereby failed to instruct the jury that if the petitioners were exercising their constitutional rights of free speech, press and assemblage in a peaceful and lawful manner, that they thereby could not be guilty of violating the said Ordinance, and that the said trial court thereby failed to follow the principle that if there was an incidental obstruction to the sidewalk, such act should not be punished but rather must yield to the superior constitutional rights

of free speech, press and assemblage; and that the trial court, by its failure to instruct the jury as requested by petitioners, and in failing to make clear the principle herein stated, deprived petitioners of due process of law within the meaning of the Fourteenth Amendment; and that the Superior Court of the State of California in and for the County of Alameda erred in failing to so hold.

V.

ARGUMENT

1. Ordinance 3-6.01 is void, upon its face, in that it takes away and bridges liberty of speech, press and assemblage, and deprives of property without due process of law in violation of the Fourteenth Amendment.

This Court has held that the right to engage in peaceful picketing is protected by the Fourteenth Amendment against abridgment by local law.

Carlson v. California, 84 L. Ed. (Adv.) 670

Thornhill v. Alabama, 84 L. Ed. (Adv.) 664

This Court has also held that the right to distribute leaflets is a constitutionally protected exercise of the right of freedom of press, and cannot be abridged by local law.

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 118

Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949

So also, this Court has held that a municipality

cannot deny or abridge the right peaceably to assemble.

Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423

Nor, under the guise of regulating the use of the streets or sidewalks, can a municipality abridge or deny the liberty of speech, press and assemblage.

Schneider v. State, supra

Judging Ordinance 3-6.01 by its four corners, petitioners contend that it violates the principles enunciated in the cases cited above. The municipality of Oakland offers in support of the validity of the Ordinance the argument that the Ordinance is designed simply toward regulating the use of the streets and keeping them free and clear for the use of the general public. We do not say that a municipality cannot regulate the use of its streets in the interests of the general public, because obviously, a municipality has both the right and duty to do so. But under the guise of regulating the use of the streets, a municipality cannot by this kind of Ordinance prohibit the exercise by persons of their constitutional liberties of speech, press and assemblage. This Ordinance does not take into account the exercise by persons of those rights, and insofar as it fails in that respect, it is void as invading and denying guaranteed constitutional liberties.

A reference to the Ordinance will reveal that it excepts from its prohibitions the obstruction of the streets "on account of public meetings." Since it contains such an exception, it would seem to us that it should also except the

use of the streets by persons for the purposes of exercising the rights of speech, press and assemblage in such a way as to not seriously interfere with the rights of the general public. The evidence in this case clearly shows that all of the activities of petitioners were peaceful and lawful; that they did not try to prevent the general public from using the sidewalk, and that in fact, the general public did use the sidewalk. Nevertheless, the Ordinance was used against petitioners in such a way that it denied guaranteed constitutional rights. The fact that the Ordinance was subjected to such use indicates that it is that kind of an all-inclusive restraint upon liberty of expression which this Court has found violative of the due process of law clause of the Fourteenth Amendment.

Thornhill v. Alabama, supra

2. Ordinance 3-6.01 violates the due process of law clause of the Fourteenth Amendment in that it is altogether vague and indefinite, and does not create or set up any reasonably ascertainable standards of guilt.

This Court has held that a penal statute must definitely and explicitly define its terms and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888

This Court has frequently stricken down laws abridg-

ing civil liberties because they are vague and indefinite. It has done so because the statute in question prohibits the exercise of constitutional rights in a peaceful manner for lawful purposes, as well as the unlawful exercise of those rights for unlawful purposes.

Fiske v. Kansas, 274 U.S. 380, 7 S. Ct. 655, 71 L. Ed. 1108

Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066

Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117

Hague v. C.I.O., supra

Schneider v. State, supra

Carlson v. California, supra

Thornhill v. Alabama, supra

No where in Ordinance 3-8.01 is there any definition of the terms "free passage," "obstructed," "crowd," "disperse," "move on."

It is apparent that the presence of any person upon a street causes some obstruction and some interference with the free passage along said street of other persons. Peaceful pickets unquestionably have a right to picket upon the streets, and persons unquestionably have a right to distribute leaflets to those who will take them, upon the streets. Such activity, in some measure, obviously obstructs free passage along the street. Is such activity subject to punishment under the Ordinance? In this case, it would seem so, although

the evidence clearly shows only the exercise by petitioners of constitutionally protected rights. There is nothing in this Ordinance to indicate to petitioners just what activity they may engage in, which this Court has said is their right, but which the municipality of Oakland is now denying by the application of this Ordinance.

What constitutes a "crowd?" Does it mean that a person must be a part of a crowd before he is subject to punishment under this Ordinance? Or does it mean that if he engages in activity which draws a crowd to watch him that he is subject to punishment? In this case, it would seem that nineteen (19) pickets on a wide sidewalk, marching close together in an uneven circle would not obstruct the sidewalk, but the evidence also shows that the nineteen (19) pickets drew a crowd of from four to five hundred persons. Are the pickets responsible and liable for the acts of this crowd which has been attracted? Nother in the Ordinance informs petitioners of the answer to this question.

Nor is there any indication as to what is meant by "disperse," or "move on." Must a person, instructed by a police officer to do so, completely leave the scene? If so, what becomes of that person's right to peacefully picket and distribute leaflets? These rights become empty ones if they cannot be exercised at the place where the controversy causing the picketing and distribution of leaflets occurred.

Such an Ordinance as this becomes a dragnet to

prohibit and punish peaceful and lawful acts where the persons involved have incurred the enmity of the law enforcement officials or other persons powerful in the community. Such is the case here. We have a small group attempting to publicize the facts of a serious economic question -- the economic plight of the Negroes. Yet, immediately upon attempting to publicize the facts of this controversy, the persons engaged in this activity are told to move on by the police, and then, if they refuse, they are arrested and prosecuted, as occurred in this case.

We submit that this law is so all-inclusive in its terms, that it punishes lawful and peaceful acts; that it fails to define its terms, or set up reasonably ascertainable standards of guilt, and that it is, therefore, void.

See: Hawaii v. Anduha, 48 Fed. (2d) 171

3. Ordinance 3-8.01 was enforced and applied against petitioners in the instant case in an unconstitutional manner, in that petitioners were deprived of liberty of speech, press and assemblage, and deprived of property without due process of law in violation of the Fourteenth Amendment.

This Court has held that while a statute may be valid, it nevertheless cannot be enforced to take away liberty of speech, press and assemblage, and that where the evidence shows a defendant to have been engaged in the exercise of such rights, that he cannot be punished under such statute.

Fiske v. Kansas, supra

De Jonge v. Oregon, supra

Harndon v. Lowry, supra

The facts in this case plainly show that petitioners were engaged in peaceful picketing, carrying banners, and distributing leaflets, to publicize the facts of the Jobs for Negroes campaign, and nothing more. Yet, they were charged and convicted, and the convictions affirmed, of violating a so-called 'Move-on' ordinance. To permit such a decision to stand, would be to nullify and circumvent the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra.

In other words, we make the point that a municipality cannot do indirectly what it is forbidden to do directly. A municipality either by ordinance or administrative act cannot deny or prohibit peaceful picketing, carrying banners, distributing leaflets, or peaceful assemblage. Therefore, it cannot prohibit the exercise of these rights indirectly by the application of an ordinance such as Ordinance 3-6.01. This most important question calls for a decision from this Court reversing the court below in this case, so that it will be clear that those rights of speech, press and assemblage guaranteed by the Fourteenth Amendment, shall be free from interference, no matter what the ordinance, statute or administrative act is that attempts to prohibit the exercise of these rights.

So also, does the refusal of the courts below to

give the requested instructions constitute an unconstitutional application of Ordinance 3-6.01.

Finally, there is not in this case any "clear and present danger" that any substantive evil will occur which the State has the right to prevent. The incidental obstruction of a street or sidewalk by a person engaged in exercising those fundamental rights of speech, press and assemblage protected by the Fourteenth Amendment, should not be punished as a crime in the light of the "clear and present danger" rule.

Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470

Herndon v. Lowry, Supra

De Jonge v. Oregon, supra

VI.

CONCLUSION

For the reasons both in law and in fact, set out herein, petitioners respectfully submit that they were deprived of liberty and property without due process of law within the meaning of the Fourteenth Amendment, and that therefore certiorari should be granted and the judgment of the Superior Court of the State of California, in and for the County of Alameda, should be reversed.

DATED: San Francisco, California

December 16, 1940

GEORGE R. ANDERSEN

GEORGE OLSHAUSEN
Of Counsel

Respectfully submitted,

HERBERT RESNER
Attorney for Petitioners

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA }
CITY AND COUNTY OF SAN FRANCISCO } ss

HERBERT RESNER, being first duly sworn, upon his oath deposes and says: That he is the attorney for the petitioners in the above and foregoing cause; that he has read and considered the foregoing petition for a writ of certiorari; together with the supporting brief, and is familiar with the contents of such petition and brief; and in affiant's judgement such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

HERBERT RESNER

Subscribed and sworn to before me
this 16th day of December, 1940

ALICE B. HORSE (SEAL)
NOTARY PUBLIC
In and for the City and County of
San Francisco, State of California

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# No. 635

# In the Supreme Court of the United States

OCTOBER TERM, 1940.

ARTHUR WELD AND LORINE KINZ,
*Petitioners,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondents.*

## RESPONDENTS' BRIEF ON APPLICATION FOR CERTIORARI

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---

### RESPONDENTS' BRIEF ON APPLICATION FOR CERTIORARI

#### INTRODUCTION.

In conformity with the rules of the Supreme Court, it is our understanding that the purpose of the Respondents' Brief is not to present an argument addressed to the merits of the case except insofar as that is involved in a showing that the questions raised in and considered by the state courts herein were determined in accord with previous decisions of this court, and that therefore this is not a case "where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Rule 38, Subdvision 5a). It will appear from

a consideration of the questions raised by petitioners herein in the light of previous decisions of this court that none of the questions were decided at variance with fundamental rules of law heretofore recognized by this court.

Four questions are presented by petitioners. As will appear from Respondents' arguments hereinafter summarized, the first and third questions are similar, although not identical, in their substance, and much of Respondents' argument addressed to each of said questions definitely bears upon the consideration of the other of said questions. However, in the interest of clarity and for the convenience of the Court in determining whether or not the writ should issue herein, the questions are considered in the order in which they are presented by petitioners.

## STATEMENT OF FACTS.

Respondents desire to call to the attention of the Court the following brief statement of facts supplementing the "Abstract" of facts appearing on Pages 2, 3 and 4 of Petitioners' Brief: (Those portions of the Transcript of Record hereinafter referred to are designated by "Rec." followed by the page and line indicated).

The "picketing" alleged to have been conducted by petitioners and others occurred on a public sidewalk. (Rec. page 27, lines 1-2). The number of persons actually participating in the "picketing" varied from fifteen to twenty-five. (Rec. page 27, lines 4-7).

Because it will appear from Respondents' argument

that this is purely and exclusively an ordinance to regulate traffic, it is important that the Court have in mind the extent to which the activities of petitioners and their companions occupied the width of the sidewalk. "These persons marched in single file. Their line of march was a rough circle, and the area covered by such circle occupied the entire width of the sidewalk between the store-front and the curb, in front of the entrance to and in front of the market." (Rec. page 27, lines 9-13). "The persons in the line kept moving at a slow pace and were about eighteen inches or two feet apart." (Rec. page 27, lines 20-21). "While the marching was taking place on the sidewalk in front of the market it was almost impossible for other persons to pass by on the sidewalk. It was the line of persons marching on the sidewalk which prevented other persons from passing; it was not the crowd of spectators in the street which caused the interference with pedestrian traffic." (Rec. page 28, lines 10-15).

The foregoing testimony of the complaining witness was corroborated by Police Sergeant Risedorph (Rec. page 29, lines 7-8) and the other witnesses called by the prosecution. The Police Sergeant further testified: "It was difficult for other persons to pass by on the sidewalk while the line of persons was marching back and forth as above described, but it was possible for other persons to pass through the crowd." (Rec. page 30, lines 4-7). This testimony was also corroborated by Police Officer Fisher, who further testified "that he saw some passers-by 'elbow their way through the crowd' and that some

passers-by 'got off the sidewalk and walked around the crowd,' and that it was possible for passers-by to get through on the sidewalk 'by weaving in and out' among the persons who were marching in the line." (Rec. page 30, lines 19-24).

Officer DeCastro testified "that the line of persons marching back and forth on the sidewalk . . . . 'got so close to the building that people couldn't pass through the crowd without difficulty." (Rec. page 32, lines 16-19).

This substantial evidence—which the jury indicated by their verdict that they believed—clearly indicates the extent to which petitioners' conduct tended to interfere with the movement of other persons on the sidewalk.

## ARGUMENT.

We proceed to discuss the questions raised by petitioners in the order in which said questions are presented in their brief. At the outset it is proper to set forth here Section 3—6.01 of the Oakland Municipal Code, under which petitioners were convicted:

> "Whenever the free passage of any street or sidewalk shall be obstructed by a crowd, except on the occasion of public meetings, the persons composing such crowd shall disperse or move on when directed to do so by a police officer. It shall be unlawful for any person to refuse to so disperse or move on when so directed to do by a police officer as herein provided."
>
> (Rec. page 26, lines 17-21).

I.

**Question: IS THE ORDINANCE VOID UPON ITS FACE IN THAT IT TAKES AWAY AND ABRIDGES LIBERTY OF SPEECH, PRESS, AND ASSEMBLAGE, AND DEPRIVES OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT? (Petitioners' Brief, page 9).**

As stated in the opinion of the appellate court which affirmed petitioners' conviction (Rec. page 42):

"The plain and manifest purpose of said Section 3—6.01 of said Municipal Code, upon which said section this prosecution is based, is to insure the free passage and use by the public, and to prevent the obstruction of the public streets and sidewalks of the City of Oakland.

" 'The police power of the city extends to all reasonable regulations relating to the keeping the sidewalks, streets, and public ways free from obstructions and nuisances and to all proper restraining regulations relative to the use thereof.' (McQuillan on Municipal Corporations, Sec. 458).

"It has been repeatedly held by our courts that it is the duty of a municipality, and the municipality has power, to keep the streets and sidewalks clear for the free use and passage of traffic and pedestrians."

This fundamental rule of law is not challenged by petitioners (Petitioners Brief, page 10, lines 13-16) but it is contended that the ordinance is void because it does

not expressly authorize "peaceful picketing" in which—it is claimed—petitioners were engaged at the time of their arrest. In other words, it is petitioners' position that the right to picket is absolute and paramount to the right of the public to use streets and sidewalks. That this is not the law is clearly established by previous decisions of this Court as well as by decisions of courts of the highest appellate jurisdiction in the several states.

In two of the very cases which petitioners cite in support of their position here, the paramount right of the *public* to the use of the streets is affirmed. In *Hague* v. *C. I. O.*, 307 U. S. 496, the Court said:

> "The privilege of a citizen of the United States to use streets and parks for the communication of his views on national questions may be regulated in the interest of all; *It is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order;* but it must not, in the guise of regluation, be abridged or denied."

And in *Schneider* v. *Irvington,* 308 U. S. 147, the Court used the following language:

> *"Municipal authorities . . . . have the duty to keep their communities' streets open and available for the movement of people and property, the primary purpose to which the streets are dedicated.* So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or distribution of literature, it may lawfully

regulate conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; *a group of distributors could not insist upon a constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leafet* . . . . Prohibition of such conduct would not abridge the constitutional liberty since such conduct bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

See also:

*Commonwealth* v. *Surridge* (Mass.) 164 N. E. 580;
*People* v. *Atwill* (New York) 133 N. E. 364;
*People* v. *Galpern* (New York) 181 N. E. 572;
*People* v. *Friedman*, 224 N. Y. S. 596;
*State* v. *Sugarman* (Minn.) 148 N. W. 466.

The ordinance in question here is purely and exclusively an ordinance designed to insure the free use by the public of the streets and highways of the city. Not one syllable of the ordinance can be construed as violating any provision of the Fourteenth Amendment of the United States Constitution or the Bill of Rights.

There is no difference of opinion between petitioners and respondents about the right of every person to freedom of speech and assemblage or about the right to engage in peaceful picketing. None of the cases cited by petitioners hold, however, that these rights are absolute or paramount;

quite the contrary, as we have shown by quoting from the opinion in the *Hague* and *Schneider* cases. In *Carlson* v. *California,* 310 U. S. 106, and *Thornhill* v. *Alabama,* 310 U. S. 88, the ordinances in question absolutely prohibited individual picketing, without reference to the question of whether or not such picketing interfered with the passage of traffic. In fact, in the *Carlson* case the Court called attention to the fact that during the period within which the picketing took place "the traffic of persons and automobiles along the highway was not obstructed." In *Schneider* v. *Irvington, supra,* and *Lovell* v. *Griffin,* 303 U. S. 444, the ordinances held unconstitutional prohibited the distribution of handbills and other literature upon the streets, either absolutely or without a permit issued by a city official; the ordinances had no relationship to the movement of traffic upon the highway. As said in the *Lovell* case, the ordinance "is not limited to ways (of distributing literature) which might be regarded an inconsistent with the maintenance of public order or as involving disorderly conduct . . . . . or the misuse of the streets." Similarly, in *Hague* v. *C. I. O., supra,* the ordinances considered prohibited public meetings and the distribution of literature without permits from a city official. The ordinances did not make public comfort or convenience in the use of the streets the standard of official action.

None of the cases cited had to do with an ordinance identical with or similar to the one involved herein. This ordinance is purely a traffic regulation, and the power of the city to enact such an ordinance is well established

by the general rules of law and by the previous decisions of this court, particularly in the *Hague* and *Schneider* cases.

## II.

**Question: DOES THE ORDINANCE VIOLATE THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT IS ALTOGETHER VAGUE AND INDEFINITE AND DOES NOT CREATE OR SET UP ANY REASONABLY ASCERTAINABLE STANDARDS OF GUILT? (Petitioners' Brief, page 11).**

In *Connally* v. *General Construction Co.* 269 U. S. 385, the Court held that statutes were not to be regarded as vague or ambiguous where

> "they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them (citing cases) or a well-settled common law meaning, nothwithstanding an element of degree in the definition as to which estimates might differ."

This states the general rule as to the certainty and accuracy which must characterize the language of a penal statute.

Petitioners complain that the ordinance contains no definition of the words "free passage," "obstructed," "crowd," "disperse" and "move on." It is true that the ordinance contains no definition of these words, but it is

submitted that the words themselves and their common, ordinary and accepted meanings require no definitions.

The word "obstructed" is the past tense of the verb "obstruct" and has the meaning of:

> "1. To block up; to stop up or close, as a way; to place an obstacle in, or fill with obstacles or impediments to passing; as, to obstruct a street, the veins.
>
> "2. To be, or come, in the way of; to hinder from passing, action, or operation; hence, to hinder; impede; retard; as, clouds obstruct the light; unwise rules obstruct legislation.
>
> "3. To cut off the sight of (an object); shut out." (Webster's New International Dictionary, Second Edition.)

This definition has been universally accepted by the courts when called upon to define the meaning of the word.

In *Conley* vs. *United States,* 59 Fed. (2nd) 929, the appellant had been found guilty of contempt under Section 268 of the Judicial Code. The court stated that:

> "There should be no uncertainty with respect to the meaning of the word 'obstruct' as employed in this contempt statute. In the dictionary it is defined 'to hinder or prevent from progress; check; stop; also to retard the progress of; make the accomplishment of, difficult and slow.' It has many synonyms of like import." (P. 936.)

In *United States* v. *Prieth,* 251 Fed. 946, the appel-

lants appealed from a conviction under the Espionage Act for their conspiracy to "unlawfully and willfully *obstruct* the recuriting and enlistment service of the United States, . . ." There the court had occasion to observe the meaning of the word "obstruct", and states on page 949:

> "The verb 'obstruct' is broad. It is defined in Webster's New International Dictionary (among other definitions) as synonymous with 'to impede, retard, embarrass, oppose,' and as 'to be, or come, in the way of; to hinder from passing, action, or operation; to stop, impede, retard'; . . ."

The following cases likewise support the same definition:

See:

*People* v. *Eckerson*, 117 N. Y. S. 418;
*Price* v. *Gabel*, 298 Pac. 444;
*Overhouser* v. *American Cereal Co.*, 92 N. W. 74;
*Knoff* v. *State*, 192 Pac. 596;
*State* v. *Malpass*, 127 S. E. 248;
*Doe* v. *United States*, 253 Fed. 903;
*Anderson* v. *Maloy*, 19 N. W. 387.

The word "crowd" has likewise been construed on a number of occasions. In *Febock* v. *Jefferson County*, 262 N. W. 588, the defendants had demurred to a complaint founded upon a state statute making a county liable for injury to person or property by mob or riot. The court in defining the words "mob" or "riot" had occasion to define the meaning of the word "crowd' stating:

". . . . the word 'crowd' as used in those def-

initions is given its well recognized meaning of 'throng', 'multitude,' (Webster's Dictionary); a numerous collection of persons or things gathered closely together."

Likewise see *People* v. *Sternberg*, 254 N. Y. S. 488, and *Morgan* v. *Mulhall*, 114 S. W. 4, in which a Missouri court held that two or three would constitute a "crowd" within an averment in a petition in an action for negligently shooting when a pistol was fired into a "crowd."

See also

*People* v. *Wilcox*, 157 N. E. 509.

The phrase "free passage" should give no person of common understanding any difficulty as to its meaning. The word "free" is defined as:

"I. Having liberty; not in bondage.

"II. Uncontrolled; unrestrained.

"III. Unconfined; unrestricted."

(Webster's New International Dictionary, Second Edition.)

and the word "passage" is defined as:

"1. Act of passing; transit from one place to another; movement from point to point; a going by, on, over, across, or through; entrance or exit; . . . .

"2. A means of passing; a way; road; path; channel or course through or by which one passes; way of exit or entrance; . . ." (Webster's New International Dictionary, Second Edition.)

The definition in the dictionary of this phrase is followed by this Court in *McKelvey* v. *United States*, 260 U. S. 353. In that action the petitioners were indicted, tried, and convicted ". . . . upon a charge of unlawfully pre venting and obstsructing, by means of force, threats and intimidation, free passage over and through certain unoccupied public lands of the United States . . ." During the course of the opinion the Court had occasion to state on page 304:

> "Another ground is that the words of Par. 3, 'or shall prevent or obstruct free passage or transit over or through the public lands,' refer to a continuing obstacle to passage or transit in general, such as a fence or the maintenance of an armed patrol, and not to a transient obstacle to passage or transit by particular persons on a particular occasion, such as is charged here. We think this ground is not tenable. The words 'by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means,' are as comprehensive of transient means of obstruction as of continuing or relatively permanent means. Besides, it is 'free' passage or transit that is to be unobstructed. *Passage or transit is free in the sense intended when it is open to all.* When some withhold it from others, whether permanently or temporarily, it is not free." (Italics ours.)

The Appellate Court of California in the recent case of *In re Harder*, 9 Cal. App. (2nd) 153, had occasion to use the words "obstruct" and "free use and passage"

and seemed to have no difficulty in understanding its meaning. There the court stated:

> "While there may be some question as to the power of the Board of Supervisors to exclude people from . . . using the public highway so long as they do not obstruct the free use and passage thereof by other persons . . ."

Finally, the word "disperse" is found to have a dictionary meaning as follows:

> "1. To cause to break apart and go different ways; to send or drive into different parts; to scatter.
>
> "2. To cause to become widely separated; to distribute; as, the Jews are dispersed among all nations.
>
> "3. To spread or distribute from a fixed or constant source . . ." (Webster's New Internation Dictionary, Second Edition.)

It appears that the meaning of this word is so clear and so unambiguous that the courts have never had occasion to construe it.

The words alleged to be uncertain and vague, on the contrary have very definite and clear meanings.

In none of the cases as cited by petitioners were any of the words or terms considered, which petitioners here complain of as vague and indefinite. In *Lanzetta* vs. *New Jersey*, 306 U. S. 451, a New Jersey statute was held void which defined a "gangster" as "any person not

engaged in any lawful occupation, known to be a member of a gang." The statute did not necessitate proof of any unlawful *actions* of a defendant; mere association with a "gang" constituted the crime. Here, on the other hand, in order to constitute a violation of the ordinance, it must appear—and it was proved—that the accused was a member of a crowd *and* that the crowd obstructed the free passage of the street or sidewalk.

The Hague, Schneider, Carlson and Thornhill cases, cited by appellant in this connection, have been sufficiently discussed above to show that they do not support this contention of petitioners.

In *Fiske* vs. *Kansas*, 274 U. S. 380, the Court rejected as invalid the Kansas Criminal Syndicalism Act, because the evidence did not show that the I. W. W. (for which the defendant was soliciting members) taught or advocated any crime, violence or other unlawful conduct. In *Herndon* vs. *Lowry*, 301 U. S. 242, the defendant's conviction of violating a Georgia statute was reversed because—as applied to the facts of the case—the statute was unconstitutional; it denounced as a felony, "any act, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." The question of guilt was held to involve pure speculation. Similarly, in *Stromberg* vs. *California*, 283 U. S. 359, the California statute which was held invalid made it a felony to display a red flag for certain purposes. The conviction was reversed because it could not be determined but that the jury had based its conviction

on one unconstitutional clause of the statute, although the two other clauses of the statute were upheld.

On page 14 of their brief, petitioners cite in support of this contention, *Hawaii* vs. *Anduha,* 48 Fed. (2d) 171. The court there rejected as unconstitutional a Hawaii statute making it a misdemeanor to habitually loaf, loiter or be idle upon any public street or highway, because the words "idle," "loiter," and "loaf" implied no wrong doing or misconduct. It is significant that the court said "the right of the territory, or one of its municipalities, to legislate against the obstruction of public streets and highways, whether caused by idlers or others, is not open to question." The Hawaii statute had no relation to the interference or obstruction of traffic, as does the ordinance in the case at bar.

On page 13, line 2 of their brief, petitioners complain because this ordinance does not "indicate just what activity they may engage in." This is not the purpose or intent of the ordinance; it does indicate—to petitioners and to him who reads—that they may *not* obstruct the free passage of the street or sidewalk, and it leaves them free to engage in any lawful activity which does *not* interfere with the free use of the streets and sidewalks by the public. The ordinance is not invalid merely because the question whether there was interference with the free passage of traffic is, of necessity, a question of fact in each case, depending upon the circumstances of each case. It is clear from the eivdence that the conduct or act of which petitioners were convicted was their own

refusal to disperse and not the presence of four or five hundred persons, who were naturally attracted to the scene by the actions of petitioners and their companions. If petitioners had not obstructed traffic and—further—had not refused to "move on" when ordered to do so by the police, they would not have been arrested and convicted under the city ordinance. Not a shred of evidence to contradict this last statement appears in the record, and there is no justification for the inference which petitioners attempt to draw, that they were discriminated against in the enforcement of the ordinance.

No reasonable person can contend that these petitioners did not clearly understand the purpose and meaning of every word in the city ordinance or that they were not expressly advised, prior to their arrest, that they must stop obstructing the sidewalk. The question raised by petitioners has been decided in this case "in accord with applicable decisions of this Court." (Rule 38, subdivision 5a.).

III.

Question: **WAS THE ORDINANCE ENFORCED AND APPLIED AGAINST PETITIONERS IN AN UNCONSTITUTIONAL MANNER, IN THAT PETITIONERS WERE DEPRIVED OF LIBERTY OF SPEECH, PRESS AND ASSEMBLAGE, AND DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT? (Petitioners' Brief, page 14.)**

To paraphrase petitioners' contention on this point,

they claim that, conceding that the ordinance was valid on its face, petitioners should not have been arrested for a violation thereof, because at the time they were engaged in "peaceful picketing". Let it be said, here and now, that it is not respondent's position that petitioners were arrested and prosecuted for any "peaceful picketing"; they were arrested and prosecuted because they were members of a crowd which obstructed the free passage of a sidewalk and because, after they had been warned, they refused to disperse. If petitioners' claim were to be sustained, then in any case where a number of persons—whether it be fifteen to twenty-five, as in this case, or one hundred and fifty, or five hundred—were gathered on a public sidewalk or street, engaged in "peaceful picketing" or in "window-shopping", they could not be dispersed, no matter how complete was the obstruction or absolute stoppage of traffic. This cannot be true. As this Court has said in the *Hague* case, supra, page 5, the right of peaceful picketing "is not absolute but relative and must be exercised in subordination to the general comfort and convenience"; and in the *Schneider* case, supra, page 6, this Court said, "The primary purpose to which the streets are dedicated" is "the movement of people and property" thereon. It is again apparent that the state court's decision in the case at bar on this point is "in accord with applicable decisions of this Court."

As for the cases cited by petitioners in this connection: All but one of them have hereinabove been distinguished.

In *Fiske* v. *Kansas,* supra, *Herndon* v. *Lowry,* supra,

and *Stromberg* v. *California,* supra, the convictions were reversed because the evidence did not show that the actions of the defendants had involved any violence or inciting to violence and did not involve the violation of any statute directly or indirectly punishing other unlawful conduct related to the public safety, comfort or convenience. In *De Jonge* v. *Oregon,* 299 U. S. 353, the Court held unconstitutional, as applied to the facts of the case, the Oregon criminal syndicalism law, because the evidence showed that the defendant spoke at an orderly and peaceful public meeting and there urged the purchase of Communist literature which, however, did not itself advocate violence or other unlawful conduct. The Court held that under the statute as the state court had applied it, any speaker at the same meeting on any subject would have been guilty, and, accordingly, as applied to the facts, the statute violated the due process clause of the Fourteenth Amendment. In other words, the evidence did not disclose—as the evidence here does—an interference by the defendant with the public safety or convenience.

## IV.

**Question: DID THE REFUSAL OF THE TRIAL COURT TO GIVE THE INSTRUCTIONS REQUESTED BY PETITIONERS CONSTITUTE AN UNCONSTITUTIONAL APPLICATION OF THE ORDINANCE? (Petitioners' Brief, page 7.)**

All that we find in petitioners' brief in the nature of argument in support of this contention, is the short sentence beginning at the foot of page 15 of the brief.

The jury was fully and correctly instructed as to the rights of petitioners to engage in peaceful picketing (see the instructions actually given by the Court which are set out on pages 35 and 36 of the Record). Instructions 1, 2 and 3, given by the trial court, embody the substance of petitioners proposed instructions numbered 1 to 7, inclusive, in so far as said proposed instructions correctly stated the law. In so far as said proposed instructions told the jury that petitioners must be acquitted *merely because* they were engaged in "peaceful picketing", they were not accurate statements of the law, as has been hereinabove set forth under our discussion of the previous Question.

Petitioners' proposed instruction number 8 would have erroneously instructed the jury that, to support a conviction there must be a specific intent to obstruct the sidewalk "for the purpose of preventing passers-by from passing along the said sidewalk." (Rec. page 38). The ordinance did not require proof of any such intent. The

crime charged in the complaint was made up of four elements: (1) That a crowd was obstructing the free passage of the sidewalk; (2) That petitioners were members of said crowd; (3) That a police officer directed the crowd and petitioners to disperse and move on; and (4) That petitioners failed and refused to obey the command. It was necessary under the general California statute that there be "a union, or joint operation of act and intent" (California Penal Code, Section 20)—and by their verdict the jury so found. Such general intent "is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." (Calif. Penal Code, Section 21). It was not necessary that there be any specific intent or wilfulness.

On page 16 of their brief petitioners complain that the application of the ordinance was not addressed to "any substantive evil . . . which the state has the right to prevent." What has been hereinabove said is sufficient to show that the sole and exclusive purpose of the ordinance and of its application in the case at bar was to insure to the public the free and unobstructed passage of the public sidewalk. Such was not only the right but the duty of the state and of the city authorities. The obstruction of the sidewalk by the crowd, of which petitioners were members, constituted a "substantive evil" within the meaning of the rule stated by this Court in *Schenck* v. *U. S.*, 249 U. S. 47, cited by petitioners in this connection. There, convictions for violating the Espionage Act of 1917 were sustained. Mr. Justice

Holmes held that the right of free speech was not absolute but was subject to considerations of the general public safety and welfare. Here, the petitioners were not arrested or prosecuted by reason of any word spoken or act done by them, except in so far as their actions were inconsistent with the free passage of traffic upon a public sidewalk.

## CONCLUSION.

Athough petitioners concede that a city has both the right and duty of regulating the use of its streets (petitioners' brief, page 10), it seems to be their position that any group of persons desiring to voice and exchange their views upon any subject whatever, may at any time occupy the whole or any portion of any street or sidewalk, to the hindrance, or even to the exclusion, of other members of the public, with impunity, and that their actions in this respect are not subject to any regulation whatsoever. If this position were to be sustained, the inevitable result would be that the law enforcement authorities of every community would be powerless to prevent the obstruction of the streets and sidewalks by large groups of persons assembling thereon, where no violence occurred and no threats were made, albeit that the "free passage" of public highways and sidewalks was being seriously interfered with.

Not one of the questions presented by petitioners has been decided by the state courts herein at variance with

the applicable decisions of this Court, and the writ of certiorari should be denied.

Respectfully submitted,

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*Due service and receipt of a copy of the within is hereby admitted this _____ day of January, 1941.*

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*Counsel for Petitioners.*